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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-338

COTLER DRUGS, INC., *et al.*, and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

against

CHAS. PFIZER & CO., INC. *et al.*, STATE OF WEST VIRGINIA, *et al.*,

Respondents.

BRIEF FOR DEFENDANT-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief is submitted on behalf of the defendant-respondents (hereafter "the defendants") in sixty-six anti-trust treble damage actions involving antibiotic drugs. A settlement of these cases was approved by the District Court for the Southern District of New York, and the approval was affirmed by the Court of Appeals for the Second Circuit. The petition for certiorari seeks a review of the judgment of the Court of Appeals. Among the many parties to the sixty-six actions and members of classes represented in them, only these petitioners appealed from the approval of the settlement by the District Court. The distribution of a fund of almost $100 million which has been deposited in escrow by the defendants is delayed by the petition.

Opinions Below and Jurisdiction

The opinions below and the basis asserted for this Court's jurisdiction are set forth in the petition and its appendices.

Questions Presented

The petitioners have conjured up nineteen "questions" that do not include the only real question, which is whether the District Court clearly abused its discretion in approving the settlement. The defendants made the offer of settlement while denying liability, and while appeals from jury convictions of three of them in a criminal antitrust case were pending. The convictions were subsequently reversed by the Court of Appeals.

A large majority of the claimants to whom the offer was made, including the present petitioners, accepted it. The District Court gave extensive and careful consideration to the mechanics of implementing the settlement, and conducted a full hearing under Rule 23(e), Fed. R. Civ. P., as to its fairness and reasonableness. In a long and well-reasoned opinion (Appendix I to the petition), the settlement was approved.

These petitioners appealed to the Second Circuit. That court gave careful consideration to the contentions of the appellants, and with another extensive opinion (Appendix II to the petition) affirmed the decision of the District Court. The Court of Appeals recognized that the basic issue before it was whether the District Court had clearly abused its discretion. No other question would be presented to this Court if it undertook a review.

Statement of the Case

The petitioners' statement of the case is slanted and argumentative, and to some extent misleading. Neverthe-

less, we will not burden the Court with a complete statement of our own, but will merely point out some important facts which may not be apparent from the petition.

The defendants made an offer of $100 million in settlement of all claims of classes consisting of states, counties and cities ("CCS claimants"), of consumers, and of retailers and wholesalers. There was no "predetermination" of how this fund was to be allocated among the various classes of claimants. Any plaintiff who had filed suit before May 9, 1969, could present a proposed allocation plan. Seven plans were presented, including one submitted by a committee of counsel for wholesalers and retailers, of which counsel for the present petitioners Cotler Drugs, et al. were members.

The wholesaler-retailer class was represented by all plaintiffs of that class who had filed suit and accepted the settlement offer, whose actions were consolidated for settlement purposes. The court appointed the committee of counsel which consisted of all counsel of record in these actions, to represent the plaintiffs and class members.

Members of the wholesaler-retailer class, to whom notice was given by mail, were afforded an opportunity to request exclusion from the class. About 1500 did so. It appears that the vast majority of these opted out because they did not feel they had a claim, since only a few members of the class have continued to prosecute their own actions outside the settlement. These petitioners and any other class members, however, could have requested exclusion and proceeded on their own. By not doing so, they elected to abide the decision of the court as to the portion of the $100 million to be allocated to the class.

The committee of wholesaler-retailer counsel vigorously represented the interests of their class. The "Alabama Plan" of allocation, which with modifications was eventually presented to the court by the defendants, would have allocated $3 million to the class. Other plans, except one pre-

sented by the wholesaler-retailer committee, would have allocated nothing to wholesalers and retailers.

The wholesaler-retailer committee's original plan would have allocated $40 million to their class. A heated controversy arose between the committee and the representatives of the CCS claimants. The latter took the position that they would withdraw from the settlement, as they could have done, if their allocations were decreased by increasing the wholesaler-retailer allocation. The wholesaler-retailer committee, on the other hand, said they would oppose any allocation plan that gave their class as little as $3 million.

This conflict forced the defendants into negotiation with both sides, which eventually resulted in a compromise that amounted to an increase in the wholesaler-retailer allocation without a decrease in CCS allocations. Thirteen actions on behalf of wholesalers and retailers had been consolidated. Counsel in twelve of these agreed to the compromise. The only active dissidents on the committee were counsel for the present petitioners Cotler Drugs, Inc. et al.

The compromise involved an agreement by the defendants under which they placed in escrow approximately $85 million, which was the amount of the settlement fund after reducing the $100 million by the amount which would have been allocated to seven states that opted out. Forty-three states, the District of Columbia, Puerto Rico, and a number of separate local governments accepted the settlement. Under the modified plan submitted by the defendants and ultimately approved by the court, and under the escrow agreement, the wholesaler-retailer class was initially allocated slightly over $3 million. Nothing was deducted for opt-outs from this class, and to the $3 million was added interest on the entire fund of about $85 million for a period of 14 months.

The result of this arrangement was that the wholesaler-retailer class will receive over $11 million, plus interest on that amount from December 23, 1970 to the time of distribution. The defendants made a substantial concession to bring this about, since the settlement offer did not obligate them to deposit money in advance of payment to claimants or to pay interest.

Argument

The petitioners' arguments are long, rambling and repetitious, and we suggest that they justify denial of the petition under paragraph 4 of Rule 23 of this Court. The arguments, fifty pages in length, consist of ten points plus a conclusion. The only actual question, however, is largely ignored. That question, as stated above, is whether the District Court clearly abused its discretion in approving the settlement and whether the Court of Appeals erred in holding that there was no such abuse.

The defendants and representatives of plaintiffs in these 66 cases engaged in almost a year of negotiations before the settlement offer was made. The proposed settlement has been under consideration by the courts for more than two years since then. Meanwhile, the antitrust convictions which resulted in a flood of damage litigation of which these cases are a part were reversed by the Second Circuit. Upsetting this settlement not only would undo the results of tremendous work, but would discourage antitrust defendants generally from making settlement offers, particularly in situations where, as here, the question of violation is far from clear.

The petitioners pay little heed to the fact that settlement and not litigation is here involved. In a settlement context the lower courts needed only to decide that there were doubtful issues. Nothing in these decisions deserves the attention of this Court.

The Alleged Failure To Follow "Settled Principles of Law"

When the petitioners reach Point IV of their argument (p. 33) they finally recognize that the question involved here is approval of a settlement. They there try to create a non-existent "conflict" between the decision of the Second Circuit in this case and that of the Sixth Circuit in *Cohen* v. *Young*, 127 F.2d 721 (6th Cir. 1942). In the *Cohen* case, the Sixth Circuit held that a District Court had erred in approving a class action settlement solely on the basis that all the attorneys for plaintiffs except the appellant's attorney had recommended approval, without any evidence. The facts here are vastly different.

The District Court in these cases had before it the complete records of two full trials of government cases involving substantially the same charges as were made here. One of these, the trial of a Federal Trade Commission case, is not mentioned in the petition, but its final outcome was a dismissal of all conspiracy charges such as the complaints in these cases make. The other was the trial of a criminal case brought by the government, which resulted in a jury verdict against three of the defendants, but the convictions were reversed by the Second Circuit for instructional errors. In addition to these records dealing with the general merits of the charges, the District Court considered affidavits and other evidence dealing with the relative merits of the claims of various classes of claimants to portions of the settlement fund.

The petitioners are not in a position to attack the overall adequacy of the $100 million offer, since they elected to look to that fund for satisfaction of their claims. They make the unsupported assertion (Petition, pp. 37-38), however, that the offer would never have been accepted by the class of direct purchasers (wholesalers and retailers) unless

class allocations "were to be based on claims filed and the applicable law." The fact is that the petitioners chose to remain in the settlement with full knowledge that the allocations were within the discretion of the court and that there were unsettled questions on the merits of which the court would not have to make a determinative decision. Further, it is presumptuous of the petitioners to say that "the class" would not have accepted the final allocations, in view of the fact that an overwhelming majority of the accepting class members, represented by all members of the wholesaler-retailer committee of counsel other than counsel for some of the petitioners, indicated satisfaction with the allocation to their class, and no one other than petitioners took an appeal.

The Hanover Shoe Case

The petitioners urge that the decisions of the District Court and the Second Circuit are erroneous because they have "practically eliminated" (Petition, p. 21) the right of direct purchasers to sue, and because (Petition, pp. 25-28) they permit a "pass on" defense, according to the petition contrary to this Court's decision in the *Hanover Shoe* case, 392 U. S. 481 (1968). Again, petitioners ignore the fact that these cases are being settled and not litigated. The District Court did not have to, and in fact could not, decide whether a "passing on" defense could be valid if the cases were litigated. The court can scarcely be said to have "practically eliminated" rights of the wholesaler-retailer class, since it allocated over $11 million to the class.

The Court of Appeals, in affirming, noted (Pet., Appendix II, p. 16) that this was not a case where passing-on was being used as a defense to avoid liability, but rather as an attempt to award damages to those who, assuming a violation of law denied by defendants, ultimately paid

higher prices (consumers), and to avoid a windfall to those who were not injured (wholesalers and retailers). It further said that the use of the doctrine here would not act to limit or frustrate treble damage claims but would have the opposite effect. Also, the court said (Pet. Appendix II, p. 17) that the situation was like the "cost plus" exception recognized in *Hanover Shoe*.

The Court of Appeals concluded that the District Court was well within its discretion on this point. (Pet., Appendix II, p. 17.) This conclusion raises no issue which justifies further review by this Court.

Consumer Classes and *"Parens Patriae"*

As a corollary to the petitioners' arguments as to their own rights, they urge that the treatment of consumers was erroneous. Arguments to this effect are scattered through the petition, somewhat confusingly. In general, the petitioners seem to assert both that consumers have no claims and that the representation of consumers by states was improper.

As at all other points, the petitioners here disregard the fact that what the District Court and the Court of Appeals had before them was a settlement. The cases cited for the proposition that consumers have no standing to sue are distinguishable in that they involved litigation and not settlement. In making the settlement offer the defendants did not admit that anyone had a meritorious claim for damages. They agreed to put up a large sum in order to dispose of all claims that had been asserted by various classes of claimants, including claims asserted on behalf of consumers, regardless of whether consumers could recover if the cases were litigated.

In litigation it might be held that consumers cannot recover.* Here, however, the task of the District Court was a discretionary determination of how much of a definite sum should be allocated to dispose of particular claims. As the Court of Appeals held, the allocation made to consumers was not an abuse of that discretion. Nothing was decided with any precedential effect that this Court should consider.

As to the representation of consumers by states, petitioners urge that the states were permitted to share in the settlement on behalf of consumers on a *parens patriae* theory. As the petition recognizes, however, and as the Court of Appeals indicated (Pet., Appendix II, p. 19), the District Court did not proceed on the basis of *parens patriae* but on that of the states acting as class representatives for their consumers, under Rule 23. The share of the settlement fund which was allocated to consumers is for individual consumers and not for the states, as an allocation on account of *parens patriae* claims would have been.

The published notices to consumers stated that if they did not file claims, that would constitute an authorization to the states' Attorneys General (or other appropriate legal officers) to use unclaimed funds "for the benefit of the citizens of your State in such manner as the Court may direct." The provision for court control eliminates any danger such as the petition suggests (p. 42), that "states hungry for revenue * * * may seize upon such opportunities as means of retaining such recoveries."

The allocation plan approved by the District Court is a "first-stage allocation." The defendants have been discharged and allocations have been made of amounts to each of the states and other suing entities, but no final disposi-

* Indeed, this is defendants' position in the actions brought by the seven states which did not accept the settlement.

tion of moneys has been directed. Each entity will seek approval of a "second-stage allocation" plan. Such plans will provide for the disposition of unclaimed consumer funds. The proponents of the "Alabama Plan" of allocation which, as modified, was approved by the District Court stated that most entities have indicated that they will seek court approval for an additional period for individual consumers to file claims, and that others will ask approval to use funds for a public health purpose, and it was recognized that the court should exercise its equitable control over unclaimed funds for the benefit of all consumers. Again, by reason of defendants' consent there was no precedential effect in this contemplated disposition of the defendants' funds.

It is clear that the district judge to whom these cases are assigned has performed his task exceptionally well. The Court of Appeals closed its opinion by saying:

> "Finally we wish to commend Judge Wyatt for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation." (Pet., Appendix II, p. 25)

The Judicial Panel on Multidistrict Litigation has said of the judge:

> "We doubt that any other single judge could have done so well. Certainly no one could have been more conscientious, diligent and scrupulously fair to all parties." (*In re Antibiotic Drugs*, 320 F.Supp. 586, 588 (J.P.M.L. 1970)

The court will certainly make sure that moneys allocated to consumers will be used for the benefit of consumers. It is not accurate to say, as the petition does (pp. 58-59), that the claims of consumers who did not file claims have been assigned to the states, in the sense of an assignment permitting the states to take the moneys and use them as they choose. Here the use of the funds is subject to the control of the court.

As the Court of Appeals noted, those who did not read the published notices and make conscious decisions are not harmed in any way, and in fact will benefit from whatever use is made of the funds. In many places, they will still be able to make direct claims for cash payments if they wish.

The Grant of Certiorari In The Criminal Case

The petitioners argue that because this Court granted certiorari to review the decision in the criminal case of *United States* v. *Pfizer et al,* 437 F.2d 957 (2nd Cir. 1970), it should grant it in these cases. The contention is that the District Court in evaluating the likelihood of success in these cases relied on the Second Circuit's reversal of the criminal convictions. It is urged that if the Second Circuit is in turn reversed, and the convictions reinstated, then the rationale of the lower court's decision here is unsustainable. A further argument is that the record in the criminal case and the judge in that case indicated that there was no price fixing at the city, county and state level.

There is no relationship between the criminal case and these cases that would make the grant of certiorari in the other case a reason why these cases should be reviewed here. The District Court of course was not required to, and did not, determine with certainty the issue of whether any of the plaintiffs in these cases would recover in litigation. The purpose for which the court dealt with the likelihood of success was related to the adequacy of the $100 million settlement offer. These petitioners did not contest the overall sufficiency of that amount.

While the District Court naturally mentioned the Second Circuit's reversal of the convictions as a reason for viewing the plaintiffs' chances as slight, this was far from being the only reason. The court also relied, for example, on the fact that the Federal Trade Commission ultimately dismissed all the conspiracy charges made in its proceeding and made in these cases. Further, even assuming that violation of the antitrust laws could be established, the court noted that there were a number of doubtful questions of fact and law as to whether the plaintiffs here could prove damages. Therefore, whatever the result may ultimately be in the criminal case, the basis for the decision approving the settlement in these cases will still exist.

It is the defendants' position that the evidence in the record of the criminal case showed no conspiracy relating to any market. The fact that the trial judge in that case conceded that there was no evidence of a conspiracy to fix prices in the city, county and state markets is of no significance in regard to the allocation of the settlement fund.

The Matter of Class Representation

The petitioners make an attack (Pet., pp. 60-63, 66-71) upon the plaintiffs and attorneys for plaintiffs who negotiated and have supported this settlement. The thrust of this is that the attorneys acted in order to obtain fees, after "shopping" by the defendants for plaintiffs who would accept a "comparatively low" settlement.

Such assertions are belied by the District Court's conclusion, on the basis of its knowledge of the progress of the actions, that "the proposed compromise was the result of good-faith bargaining at arms' length." (Pet., Appendix I, p. 71) The petitioners are in substance urging that no one who supports a proposed settlement can be a proper repre-

sentative of classes to which it is proposed. The effect of sustaining such a position would obviously be that no settlement of this character could ever be made.

Summary

A grant of certiorari in these cases would hold up, and might destroy, a settlement accepted by a large majority of those to whom it was offered. Such a result could be justified only if there were questions meriting consideration by this Court. No such questions were presented in the District Court or the Court of Appeals, and none could be presented here:

1. Nothing in the lower court decisions has any precedential significance as to what might have been established in litigation. The petitioners and others were not forced, and could not have been forced, to accept the settlement offer. They could have opted out and continued to litigate, in which event it might have been held that the defendants had no liability to anyone or that a class or classes of claimants could recover to the exclusion of others. Those who elected to settle knew they were leaving the allocation of the settlement fund to the District Court's discretion, which the Court of Appeals held was not abused.

2. Nothing was decided as to whether, in litigation, states can recover for damages to their economy allegedly caused by antitrust violations. This question is involved in *State of Hawaii* v. *Standard Oil Co. of California et al*, 431 F.2d 1282 (9th Cir. 1970), now before the Court on certiorari, but is not presented in these cases. Here states were allocated portions of the settlement fund for themselves and for local government entities only on account of purchases and of reimbursements in connection with welfare programs.

3. Nothing was decided as to whether in litigation states can recover for themselves, under a *parens patriae* doctrine, damages allegedly suffered by their citizen-consumers from antitrust violations. In these cases any part of the settlement fund allocated for consumers which states may obtain will be received by them by virtue of authorization by consumers and by consent of defendants, and will be used under court supervision for the benefit of consumers.

4. Nothing was decided as to whether wholesalers and retailers could have been deprived of participation in the settlement fund, on the basis of "passing on" or the absence of damages. The District Court in its discretion allocated to them an amount now well over $11.5 million which will be greater by the time of distribution.

Settlements of massive litigation of the kind of which these cases are a part must be encouraged if the federal judicial system is to continue to function. The petitioners have been afforded a full and painstaking consideration of all their arguments by the District Court and the Court of Appeals, as the opinions of those courts demonstrate. Granting of the petition would result in further delay, while presenting no question of general importance to this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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BRIEF IN OPPOSITION ON BEHALF OF COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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This Brief in Opposition to the Granting of a Writ of Certiorari is submitted on behalf of the Committee of Counsel for the "Consolidated Wholesaler-Retailer Class Action" representing all retailer and wholesaler druggists in the United States. The Committee of Counsel was constituted by Judge Wyatt in the District Court proceedings below. It was composed of all counsel of record, as of May 26, 1969, for all parties plaintiff in the various class actions brought by wholesale and retail druggists then